IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COZEN O'CONNOR, a professional corporation	:	**CIVIL ACTION**
v.	:	**NO. 05-4332**
UNITED STATES DEPARTMENT OF TREASURY	:	

MEMORANDUM OPINION

Savage, J. **December 2, 2008**

Because there were questions regarding the adequacy of the Treasury Department's search for documents responsive to Cozen O'Connor's Freedom of Information Act ("FOIA") request and the applicability of asserted exemptions to certain documents,[1] Treasury's motion for summary judgment was denied. Order, August 7, 2008 (Document No. 71). At the same time, Treasury was given the opportunity to supplement the record to address the concerns raised in the memorandum opinion of August 7, 2008. *See Cozen O'Connor v. U.S. Dep't of Treasury*, 570 F. Supp. 2d 749 (E.D. Pa. 2008). It has done so and now renews its motion for summary judgment.

Considering Treasury's response to the Order denying summary judgment, its supplemental declarations and exhibits, and its *in camera* submissions, I now conclude that Treasury's search was adequate and its asserted exemptions were proper. Additionally, any confusion that may have existed among the various agencies' *Vaughn* indices has been clarified. Treasury has also produced the commercial databases it had previously withheld under Exemption 7E. Therefore, summary judgment will be entered in favor of

[1]The factual and procedural history of this case is recited in *Cozen O'Connor v. U.S. Dep't of Treasury*, 570 F. Supp. 2d 749 (E.D. Pa. 2008).

Treasury and against Cozen O'Connor.

Adequacy of Search[2]

Treasury's response must be evaluated in light of the request itself.[3] Cozen defined the scope of the search by specifically requesting files generated in the designation process. Treasury searched, by name, the evidentiary files that were the product of the designation process and the blocked assets database that contained information of designated entities and persons. It also looked at delisting files.

Treasury had limited its search to evidentiary files that had been developed during the terrorism designation process. Because it claimed that other files were "not likely" to contain responsive documents, it left open the possibility that those "other files" might have requested information. In addition, its search methodology was not fully explained.

In response to the Order of August 7, 2008, Treasury has submitted another declaration by Virginia Canter, Associate Director of Research Management for Treasury's Office of Assets Control ("OFAC"), that provides additional details regarding how Treasury conducted its search and what was searched. *See generally* Fourth Canter Decl., Sept. 15, 2008. Canter's declaration clarifies earlier statements and dispels the impression that files beyond the evidentiary files could contain responsive documents. Treasury now explains that those "other files" do not relate to the designation process, that is, they do not contain information that was used in making the designation decision. They relate to post-designation activities, such as enforcement, licensing and civil penalty actions.

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[2]The pertinent legal principles and standards are set forth in *Cozen O'Connor v. United States Dep't of Treasury*, 570 F. Supp. 2d 749 (E.D.Pa. 2008). Thus, there is no need to reiterate them here.

[3]570 F. Supp. 2d at 763 (discussing Cozen's request).

Treasury is not required to search for documents that go beyond what Cozen specifically requested. There might be other documents somewhere in Treasury's possession. But, Treasury has performed an adequate search that was reasonably calculated to uncover documents responsive to Cozen's specific request.

The test of adequacy is one of reasonableness. As long as the agency has conducted a search that is calculated to produce the requested information, it need not show that its search was exhaustive. Having clarified what it meant when it used the words "typically" and "likely," Treasury has demonstrated that its search was adequate.

Continuing Obligation to Respond

Cozen complains that Treasury has not supplied it with documents relating to entities that were listed on its request but were not designated until after the request was made. Treasury has no obligation to produce documents that were not responsive at the time the request was made. *See Bonner v. U.S. Dep't of State,* 928 F.2d 1148, 1152 (D.C. Cir. 1991).

An agency does not have a continuing duty to update its previous response to a FOIA request. *McGehee v. CIA,* 697 F.2d 1095, 1103 (D.C. Cir. 1983). A document's status is determined at the cut-off date. *Bonner,* 928 F.2d at 1153. A subsequent decision that changes the status of the document does not render it improperly withheld. *Id.* This is consistent with the notion that an agency is not required to produce documents that were exempt at the cut-off date but subsequently became nonexempt after the agency fully responded to the FOIA request. *See Ashfar v. Dep't of State*, 702 F.2d 1125, 1137 n.18 (D.C. Cir. 1983) (noting that although the government declassified requested documents

after the cut-off date, remanding the case to take into account that change would be contrary to FOIA's goal of speedy and final resolution of FOIA requests); *McGehee,* 697 F.2d at 1103. In these circumstances, the requester may submit another FOIA request. *Bonner,* 928 F.2d at 1153.

An agency is expected, however, to update the FOIA request when it has improperly withheld information in its prior responses or has not responded fully to the FOIA request. *See id.* An inadequate search renders the initial cut-off date as suspect. *Dayton Newspaper Inc. v. Dep't of Veterans Affairs,* 510 F. Supp. 2d 441, 452 (S.D. Ohio 2007). Therefore, when a search has been found to be inadequate and another search must be conducted, the date of the supplemental search can serve as the cut-off date. *Id. at 451*; *Wilderness Soc'y v. U.S. Bureau of Land Mgmt*, No. 01-2210, 2003 WL 255971, at *7 n. 18 (D.D.C. 2003).

Here, Treasury's search was adequate. Treasury used December 1, 2006, the date it completed processing Cozen's request, as the cut-off date. It notified Cozen of this cut-off in a letter dated December 1, 2006. Given the nature of the request and these proceedings, this cut-off date is not unreasonable. Accordingly, Treasury is under no duty to update its response to Cozen's request after December 1, 2006.

Because Al Haramain was not designated until June 19, 2008, documents relating to Al Haramain's designation were either outside the scope of Cozen's original request or exempt from disclosure at the time of the request. If Cozen still wants those documents, it may submit a new request. It will not be permitted to use this litigation to obtain documents that were not responsive to its request before December 1, 2006.

Interagency *Vaughn* Indices

Although Treasury's *Vaughn* index was sufficient, it was unclear how the documents sent to the Federal Bureau of Investigation ("FBI") and Immigrations and Customs Enforcement ("ICE") for response and listed on the indices of those other agencies correlated with the documents on Treasury's index. In short, one could not discern whether the agencies were describing the same documents. Hence, Treasury was ordered to submit an index cross-referencing the documents to the other agencies' indices.

It was impossible to tell from the original *Vaughn* indices what documents had been referred to which agencies or whether those agencies responded directly to Cozen or to Treasury. Because the other agencies' *Vaughn* indices did not reflect referrals from Treasury, there was no ascertainable relationship between Treasury's "placeholders" and any of the agencies' documents. Canter's latest declaration clarifies by stating that the placeholders were in error and were supposed to be removed from Treasury's *Vaughn* index.

Pursuant to the Order, Treasury prepared a cross referencing *Vaughn* index that, to the extent possible, links the documents on the various indices. Now, the relationship between the documents is clear. The documents are adequately identified and the asserted exemptions are keyed to the appropriate documents.

Another problem with the referral process was that there was no verification that all the other agencies responded to the referrals. In other words, it was not known whether the other agencies responded directly to Cozen or to Treasury. Treasury has submitted a letter from each agency that processed the documents referred to it, verifying that it

reviewed all documents that had originated from Treasury. Where the agency responded only to Treasury, the referral was so noted.

While reviewing the previously submitted *Vaughn* index, Treasury discovered and corrected several errors. Where the original *Vaughn* index erroneously reflected a referral or asserted an exemption, it has been corrected.

Commercial Databases

Because the descriptions of the commercial databases that Treasury had withheld under Exemption 4 were not sufficient to assess the validity of Treasury's claims, Treasury was ordered to produce the commercial databases for *in camera* review. In response to the Order and the Memorandum Opinion, Treasury has waived any assertion of exemptions and commercial databases and has produced the commercial databases to Cozen.

ICE *Vaughn* Index

The original *Vaughn* index submitted by ICE did not adequately describe the documents it withheld nor its reasons for withholding them. Therefore, it was ordered to submit a more detailed *Vaughn* index.

ICE has amended its *Vaughn* index and has provided more detailed document descriptions as well as the asserted exemptions. Reviewing the revised index, I conclude that the exemptions have been properly asserted and the documents were properly withheld.

Probable Cause Affidavit

Asserting Exemption 5, the FBI withheld a draft of a probable cause affidavit that had been prepared in connection with an application for a search warrant. The reason given for withholding the affidavit was that the FBI could not confirm whether it was a final version. After it was ordered to produce a copy of the affidavit for *in camera* review, the FBI located the final version and produced it.

Attorney's Fees

Cozen complains that Treasury has not done enough and wants it to process additional files and documents**,** yet argues it should not be required to pay for the processing Treasury has already performed. As justification, Cozen cites the requirement that Treasury consult with it before proceeding and incurring additional fees.

Cozen can not seriously suggest that it would have considered telling Treasury to cease its search because it may not have wanted to pay any more fees. Its complaint about the inadequacy of Treasury's search and its continuing demand for more production refutes any such suggestion. Therefore, there is no reason that Cozen, as a commercial user, should not be required to pay the cost of the government's responding to its extensive search for sensitive material.